

The study proceeds from there to follow its own advice, notwithstanding the availability of facts to the contrary. For example, in its "Economic Analysis" section SPR asserts that: "...it is unrealistic to anticipate that [DARS] can make economic sense...if it does not draw some significant support from current audience." This contrasts directly with NAB's Opinion Research Study finding that almost ninety percent of DARS listening would be "new" and in no way related to, or diverted from, current radio audiences.⁶⁰

Further, SPR notes that DARS proponents "may be right" when they assert that there will be little impact on terrestrial radio listenership because new advertisers and new listeners will be drawn to DARS.⁶¹ SPR nevertheless suggests several considerations indicating that terrestrial radio will be injured including:

the strong opposition to satellite DARS by radio broadcasters who plainly perceive a significant competitive threat. If there is no threat, how then account for the behavior of perceived competitors? The simplest and best explanation is that broadcasters can be relied upon to know one when they see one, and that there will likely be a competitive impact."⁶²

Simply put, evidence of competitive impact on broadcasters can be found in the fact that broadcasters believe there will be competitive impact. It is important to note that broadcasters have a less than stellar track record at spotting harmful competition -- incorrectly proclaiming

⁶⁰ ORS at Attachment 5. This study and its conclusions is analyzed in greater depth in Appendix A.

⁶¹ In fact, it appears that DARS proponents are right. NAB's listener survey shows that close to 90% of our listeners will come from somewhere other than radio. See, *infra*.

⁶² SPR at 38. SPR also suggests, without any factual evidence, that DARS listeners are likely to come from current terrestrial listeners who will substitute DARS for conventional radio. NAB and other opponents assume that DARS entry will only, or largely, derive customers from existing radio. It ignores the possibility that DARS will attract listeners from other audio and leisure time options including compact discs, cassettes tapes and books-on-tape.

the demise of broadcasting at the first sign of TV, FM, cable and Direct Broadcast Satellite. An independent analyst (and NAB consultant in this proceeding) confirms the adaptability of DARS: "[Radio] has already survived competition from newspapers, television, cable TV, records, cassettes, walk-along tape players, CDs, cable radio, video games, and computers for a share of consumers' attention and leisure time."⁶³

The SPR report consists in large measure of statements by people interviewed by SPR and "the main burden of this report is simply to convey [their] views to the Commission in a constructive and convenient way."⁶⁴ Thus, the principal findings of the Study are inferred by the authors from statements made by interviewees. Careful review of those individual findings, their analytical and methodological foundations and the interviews upon which they are based, reveal that while the findings, based as they are on the most casual empiricism and freewheeling theorizing by clearly self interested observers, do not have much probative value, neither do they undercut the case for DARS, even if the Commission accepts them fully at face value.

The SPR study does no more than support its own premise -- broadcasters believe they will be harmed by DARS. Neither SPR nor NAB provide evidence to support the conclusion that broadcasters *will* be harmed. Overshadowing the inability of the NAB to present hard data regarding economic impact is *the sheerchutzpa displayed by an allegedly independent consultant that bases conclusions of harm on the fact that those are the conclusions his clients wished him to reach.*

⁶³ KMA at 7.

⁶⁴ SPRat 7.

NAB's claims indicate clearly that it is in touch with its dues-paying members and, based on the comments in this proceeding, disconnected from the public it is supposed to serve. Its cavalier attitude is reflected in the SPR Study which presents, in carefully selected markets, interviews with local broadcasters, local civic organizations and local advertisers. Each lauds the local radio station for its community service and for providing a local advertising outlet. Ignored are the local listeners tastes, desires and satisfaction with the local radio outlet.

The SPR study fails to rise to the Commission's standard of proof regarding economic impact. SPR's analysis is based on "reasonable" and "prudent" analysis of unsupported anecdotal information. Needless to say, this does not even begin to approach the Commission's standard that "strong evidence" be adduced that DARS, and DARS alone, will produce a "significant net reduction" in service to the public. Speculative allegations concerning possible reductions in services, such as those offered in the SPR study, may be discounted and can not sustain a request for regulatory intervention to halt the development of DARS.⁶⁵

3. NAB's Public Interest And Impact Analyses Are Based On Inaccurate Market Statistics.

NAB, and other broadcast commenters, assert that competition, multiple signals, diversity of programs and other services, *e.g.*, emergency broadcasts, are abundant in markets of all sizes across the country. According to NAB almost all Americans have access to tens

⁶⁵ See, "Digital Audio Radio: Critique of Economic Harm Studies," prepared by Dr. Larry F. Darby, Darby & Associates, Washington, D.C. (hereinafter "Darby Study") attached hereto.

of radio signals that provide ample diversity and choice, and which offer unparalleled local, community-based service. As a result, the incremental benefits offered by DARS, if any, are unnecessary particularly when compared to the damage it will cause to local radio.⁶⁶

NAB admits that the anecdotal nature of the SPR Study requires independent quantification of competition, diversity and availability of stations and formats throughout the United States.⁶⁷ NAB unsuccessfully attempts to do so.⁶⁸ Based on this effort, NAB claims that the benefits of DARS -- new and expanded service to underserved areas, additional choice in well-served areas, niche and specialized programming -- are already provided in abundance by local radio stations that will be forced by DARS to cut back these services.

NAB alleges that even sparsely populated areas, counties with less than 1,000 residents, allegedly receive 15 stations each⁶⁹ and the smallest markets receive an average of 15 formats. Thus additional service to unserved areas is unnecessary and more choice in urban areas, which already have ample radio service, would be of marginal value, especially given the risk to local service. NAB admits that DARS could aggregate national audiences for niche programming, but points out that there is already sufficient niche programming

⁶⁶ The SPR study participants list "diverse formats" including jazz, classical, all news/talk, country, classic rock and contemporary. These formats do not qualify as "diverse" in DSBC's opinion. DARS will permit multiple finely-segmented formats that are truly diverse subsets of the formats listed by SPR participants. For example, DARS classical selections might include an opera channel and a symphonic channel, in CD-quality, and news/talk formats, at lower data rates, can be subdivided into a long-form political affairs channel and a long form news channel, among others.

⁶⁷ NAB Comments at 16.

⁶⁸ NAB Comments at Attachments 2-4, 11, 12.

⁶⁹ Arbitron County Data, NAB Comments at Attachment 3.

available in markets across the country.

Stations Serving Communities. NAB is very selective regarding its supporting data. Rather than discuss the number of stations licensed to serve a community, NAB chooses a definition of "market" that includes stations licensed to serve that market or "if the market is a primary focus of [the station's] marketing activities"⁷⁰ regardless of what community the Commission has licensed it to serve. Since communities of license are the *sine qua non* of "localism" this overcounts the number of "local" stations in any given market. For example, Hanford, CA, one of the SPR Study markets, has 6 stations licensed to serve it, but, according to NAB's methodology, it has 22 stations "located in the market," including satellite-delivered stations.⁷¹ Similarly, NAB uses overinclusive data to "demonstrate" that there is an even greater availability of signals coming into every market.⁷² It analyzes, on a county by county basis, the number of different stations mentioned in audience surveys conducted by Arbitron and concludes that diversity is high -- even counties with less than 1,000 persons have almost 15 radio stations. However, the standard for being included in this calculation is low -- a

⁷⁰ "1995 M Street Radio Directory" at 611.

⁷¹ NAB Comments Attachment 2, citing M Street Radio Corporation Data. This disparity results from whether one reviews a list of stations licensed to serve a market or stations available in the market. NAB offers no reason for choosing the latter standard. DSBC maintains that the former is more relevant since this proceeding is about service to communities of license.

⁷² DARS proponents often cite to the fact that Jules Cohen & Associates indicate that almost 22 million Americans are served by five or fewer FM stations, *Primosphere* Supplement, Jan. 3, 1995. FM stations are considered relevant to the analysis of listeners choices among high-quality aural services.

station is attributed to a county so long as one audience survey diary included its call letters.⁷³

Format Diversity. NAB's data supporting claims regarding format diversity are similarly overinclusive. "Formats" includes programming offered for an unidentified portion of the programming day or week. Thus, a small market may have many formats provided during a fraction of the broadcast day. Moreover, NAB ignores whether these formats are carried by satellite or provided by another station outside of the licensed market pursuant to a local marketing agreement or simulcast, *i.e.*, a station without a market presence.

Further, NAB asserts that hundreds of stations⁷⁴ across the U.S. provide sufficient ethnic and niche formats, eliminating the need for more of this programming from DARS.⁷⁵ It claims that 118 stations provide programming in languages other than English or Spanish.⁷⁶ Assuming the accuracy of this count, that is less than 1% of radio stations, yet over 6% of the American population speaks a language other than English or Spanish at home.⁷⁷ NAB also claims that more than 1,200 stations offer foreign language programming, over 700 of which

⁷³ NAB 1995 County Radio Listening Study, NAB Comments Attachment 3. In contrast, Jules Cohen & Associates uses a scientific, geographical approach that takes into account measurable station coverage footprints and parameters (60 dBu contour, antenna height and radiated power).

⁷⁴ Or thousands, depending on which NAB attachment one believes. Compare Attachment 12A with Attachment 12B.

⁷⁵ For example, the Longview, WA, station cited in the SPR Study provides evidence of ethnically diverse programming by stating that "For years, there has been a polka program. We have a large Scandinavian population and they play it on Sunday." SPR Study at 107. It would have been interesting to know if the members of the Scandinavian community agree that a few hours per week of polka music serves their needs. Of course, no such information was submitted.

⁷⁶ Comments of NAB at Attachment 12A, citing M Street Radio Corporation, 1995.

⁷⁷ *Statistical Abstract of the United States, 1994.*

offer programming other than Spanish.⁷⁸ Closer inspection reveals that this includes all stations in the U.S. that provide one hour *per week* of special programming.⁷⁹ One is hard pressed to find *any* stations devoted solely, or primarily, to niche formats such as Chinese or even children's programming. There is *no* listing for programming directed at seniors.

NAB's analysis of stations and formats is based on market definitions and format lists that are overinclusive and result in self-serving inflation of the data, and its conclusions, regarding current service and format availability. Although the issue framed by the NAB is "localism," *i.e.*, broadcasters serving their community of license, NAB incorporates data that is based on signals imported from other communities. Even assuming that NAB is correct regarding the amount of service available, there is clearly demand for additional services as demonstrated by NAB's own survey of listener's interest in DARS. When commenters and listeners are heard the view is quite different than NAB's.

⁷⁸ NAB Comments at Attachment 12B. NAB never explains the considerable discrepancy between the amounts of foreign language programming cited in these two attachments.

⁷⁹ NAB Comments at Attachment 12B. For example, NAB claims that nine stations offer Vietnamese programming. Staff at two stations indicate they have abandoned this format. One station in Washington D.C. appears to be off the air. The final total is 6 stations offering total programming of 14 hours, an average of less than 3 hours per station per week to serve over 500,000 Vietnamese nationwide. A similar check of Attachment 12A shows that many of the 118 ethnic stations listed actually offer no ethnic formats.

C. DARS Provides Benefits That Far Outweigh Any Costs.

1. Public Oriented Service Will Increase.

NAB avers that DARS will be of interest to too few people to justify the harm inflicted on local radio.⁸⁰ Notwithstanding NAB's claim that listeners are well served, the NAB's Opinion Research Corporation Listeners Survey⁸¹ demonstrates that individuals are interested in DARS in addition to their current radio programs. In fact, interest in DARS is high among groups that are not adequately served by conventional radio, *e.g.*, families with children and the elderly. For example, 20% of respondents over 65 indicated that they were "interested" or "very interested" in DARS. Assuming that these figures are true for the population as a whole, that translates into six million Americans over 65 interested in DARS and unserved by conventional radio.

DSBC's Fielded Research Survey⁸² also indicates that Americans seek more diversity from their audio entertainment choices. Substantial numbers of respondents⁸³ indicate that they would value channels devoted to opera, children's programming, senior citizen's

⁸⁰ Comments of NAB at 40.

⁸¹ NAB Comments Attachment 5.

⁸² See, Comments of DSBC at 18, note 18. (hereinafter "DSBC Fielded Research Survey") DSBC sponsored a nationwide survey with a final sample size of 1100 interviews. The survey sampling was proportionate to the geographical distribution of the U.S. population. The sample pool of phone numbers allowed for the inclusion of unlisted phone numbers and newly listed residential numbers. The sample was "worked" so that each phone number had a minimum of seven attempts at contact. This methodology ensured that all people in the potential pool had an equal chance of being included. Sampling error is +/- 3.1% at 95% confidence level of the total sample base.

⁸³ DSBC is hesitant to offer more specific information regarding its survey results which it considers proprietary and confidential. Suffice it to say that the markets discussed herein are large enough to sustain economically viable programming channels, in DSBC's opinion.

programming, farm information, international programming and hobby information. Beyond entertainment programming, there is significant pent-up demand for informational and educational services. For example, interest in the above formats was equalled or exceeded by interest in literature readings, continuing educational services, and programs for the visually impaired and housebound.

Moreover, organizations representing the interests of these groups filed comments supporting the increase of programming promised by the advent of DARS. The record is replete with comments from the Korean, Vietnamese, Chinese, and Italian communities supporting DARS for its ability to deliver full-time foreign language and ethnic formats and completely and irrefutably contradicting NAB's claims to the contrary:

- Broadcasters claim that ample radio signals are already present in rural markets. To the contrary, numerous rural public interest groups have filed supporting DARS because it will provide additional rural service.⁸⁴
- Broadcasters aver that radio service to travelers is sufficient throughout the country. Nevertheless, trade associations representing long-haul truckers, recreational vehicle users, boaters and the hospitality industry approve of DARS as a method to increase choice for their constituents.
- Broadcasters claim that sufficient diversity of niche programming is available throughout the country to satisfy the tastes of all Americans and submits lengthy format lists to prove this point. The record is filled with comments from the Korean, Chinese, Vietnamese and Italian communities supporting DARS for its ability to deliver full-time foreign language and ethnic formats.
- Finally, DARS offers important emergency capability. DSBC's service would have been valuable to residents of the Virgin Islands recently when two hurricanes did a better job of destroying local service than DARS ever could.

⁸⁴ Comments of Recreation Vehicle Association; Comments of American Council on Rural Special Education; Comments of Wyoming Farm Bureau Federation; Comments of United States Department of Agriculture, Forest Service.

All radio service on the islands was completely cut off. DSBC's Caribbean spot beam could have provided useful information to the stricken areas.⁸⁵

NAB's view of "ample" programming appears to be what broadcasters want to provide, when they want to provide it. The facts indicate that substantial numbers of Americans are not receiving the service they want, when they want it. A problem DARS programming will rectify.

The NAB simply can not have it both ways. If DARS does not present new programming distinct from conventional broadcast programming then there is no reason for audiences to change to the new service and terrestrial radio will not lose listeners. If listeners choose to switch to DARS, that is, if radio loses some audience, it is because they prefer the new service -- proving that DARS has benefits not provided by conventional radio.

2. DARS Will Stimulate, Not Eliminate, Local Programming.

NAB posits that competition from DARS will require broadcasters to economize by reducing program costs and assumes that local programming will be the first expense item eliminated to meet the competitive threat of DARS. NAB stipulates that larger stations and large markets will be able to shoulder the advent of DARS, however, it claims that DARS impact on small stations and in small markets will be immense and will affect community service.

NAB argues that reduced advertising revenues as a result of audience diversion from DARS will cause broadcasters to economize by cutting local programming expenses.

⁸⁵ "Telcos Repairing Hurricane Damage That Cut Phone and Radio-TV Service," Communications Daily, Sept.13, 1995 at 2-3 (Media blackout made it difficult for island's governor to issue emergency declaration).

Alternatively, they will suffer unsustainable diminution of their profit margins and go dark.

NAB bases its conclusions on a study by Kagan Media Appraisals, Inc. ("KMA" or "Kagan"). It presents a financial model that purports to demonstrate the effect of various levels of impact on existing stations, a sensitivity analysis of sorts.⁸⁶ The assumption set, although never articulated, is obvious from inspecting the data. First, Kagan assumes that impact from DARS is immediate and instantaneous rather than spread over time and years in the future.

This, however, is not the case. Even if DARS licenses were issued immediately, DARS operators face lengthy satellite construction time frames. Thus, it will be the end of the decade before service is initiated. Once satellite service is begun, DARS operators must convince consumers to purchase new receivers and DARS service. Once consumers are aware of and accept DARS, penetration could still be slow. In comparison, compact disc players, which enjoyed rapid consumer acceptance, have only penetrated 19%⁸⁷ of the mobile market after 10 years. Thus, broadcasters have many years to prepare for the advent of DARS, and many more before penetration is significant.

However, Kagan's conclusions assume that broadcasters take no action to enhance their business, improve their market position, or add revenue streams. This not only defies logic, it defies experience. Broadcasters, rather than acting like "deer-in-the-headlights," are likely to react very effectively, judging by past performance, by economizing, aggressive promotion,

⁸⁶ This study is discussed in the Darby Exhibit, *supra* note --.

⁸⁷ DSBC Fielded Research Survey.

creating new and attractive programming, and adding revenue streams.⁸⁸ Instead, KMA implies that broadcasters have only one option -- reduce costs by reducing local programming.

There is absolutely no hard evidence offered by NAB or Kagan that broadcasters will protect their bottom line by cutting local programming. First, the NAB and broadcasters disregard the Commission's explicit requests for data regarding the quantity of local programming broadcast, the costs incurred in producing local programming, the revenues derived from it and what portion of expenses and profits are attributable to local programs. This information is uniquely available to broadcasters and should have been submitted to the Commission to complete the record. The absence of such information is in blatant disregard of specific Commission requests and undercuts the NAB's ability to meet its burden of proof.

Instead, NAB and broadcasters simply assert that such programming will be cut without any explanation of the economic or business issues that require that result. This makes difficult an analysis of whether or why a station might cut this programming or whether such a decision is related to DARS. It may be that local programming is a significant cost item, but it is likely to be a more significant profit center. For example, the SPR Study quotes Hiram Champlin, a broadcaster in Enid, OK, as indicating that his station realizes a gross margin of 50% on a local sports event broadcast. The burden is clearly on the broadcasters to state facts relevant to their assertion that DARS will cause a decrease in locally produced programming, particularly when those facts are in their possession. That burden has not been met.

⁸⁸ Digitalization, Internet radio services, and RBDS will present multi-billion dollar revenue opportunities by the end of the decade, about the time DARS will launch. These issues are discussed in the Darby Study. See note --, supra.

Finally, it defies logic. If broadcasters are required to streamline operations, local programming is not necessarily the first area cut, there are less draconian measures available that make more sense. It is unlikely that broadcasters will cut their ties to the local community and reduce the programming that, according to their own statements, attracts their listeners. Instead of eliminating their competitive strength they will improve and increase it.⁸⁹

NAB's conclusion once again defies logic and experience. Radio stations will cut expenses where they are faced with competition (satellite delivered national formats) and increase spending in areas that are competitive strengths (local programming). Moreover, when faced with competition in the past broadcasters have utilized various promotional and marketing efforts to *increase* radio's share of advertising. Broadcasters will be well served by playing to their competitive strength as a voice of the local community, something DARS simply can not do. Finally, DARS presents an opportunity for broadcasters to extend their reach, and revenues, by uplinking their terrestrial format to a wider audience.

2. Economic Effects on Local Radio Audiences and Revenues Are Overstated.

NAB maintains that impact on audiences is the proper measure of DARS' effect on listener welfare. NAB alleges a one-to-one effect of audience diversion on advertising revenues⁹⁰. As a result of audience diversion from DARS, advertising revenues will be reduced, requiring broadcasters to economize by cutting back on locally-oriented programming. NAB argues that the minimal incremental benefits of DARS are not worth the

⁸⁹ See, Darby Study.

⁹⁰ It is important to note that a diversion to high-quality digital radio does not mean a diversion away from terrestrial radio. Broadcasters will soon have the opportunity to initiate in-band, on-channel digital radio services. See Darby Analysis.

losses in local programming that will result from DARS diversion of audience and national advertising. NAB therefore urges the Commission to implement DARS in a manner that assures that purported benefits are worth the expected costs.

NAB overstates the impact of DARS on conventional radio audiences.⁹¹ It ignores that the DARS market will include users of cassettes, compact discs, and books on tape. A substantial majority of DARS audiences will come from elsewhere.

Finally, NAB fails to consider the resiliency of broadcasters and their ability to ward off the negative effects of competition and thrive almost without regard to economic conditions. Even in hard times, radio broadcasting expanded its share of advertising through creative programming, savvy business tactics and aggressive marketing of itself as an advertising outlet.⁹² As a result, radio recently posted its 36th consecutive month of increased revenue. It would be folly for the Commission to underestimate the abilities of broadcasters, even if NAB does.⁹³

NAB's pleading is the height of regulatory chicanery. It claims that DARS will result in no new programming beyond what is already offered by terrestrial broadcasters. This claim cannot coexist with claims of audience diversion sufficient to destroy local broadcasting. Far from submitting evidence to demonstrate that DARS will cause harm to broadcasters that will result in harm to the public interest, the NAB studies tend to support

⁹¹ These issues are thoroughly explored in the Darby Attachment in the context of the KMA Analysis, the Opinion Research Study and the MKA letter.

⁹² "Radio Fast Approaching the \$12 Billion Year" Radio Broadcast Report, July 3, 1995 (during the 1991-92 advertising recession "radio sales teams got better and smarter").

⁹³ See Darby Study discussing radio industry profitability and growth -- it is the top growth industry in the top growth sector (communications).

conclusions contrary to the broadcaster's positions: local stations will be the only means for Americans to receive local news, weather, sports and traffic conditions (SPR Study); audiences desire programming in addition to what they are offered by broadcasters (Opinion Research Study); DARS listeners will come from many new untapped sources (ORS); and, even KMA fails to account for broadcaster well-demonstrated adaptability to new technologies and reaction to DARS. Thus, NAB, and other broadcast commenters have failed to meet their burden of proof to demonstrate that DARS is inconsistent with the public interest.

III. THERE IS NO JUSTIFICATION FOR REOPENING THE APPLICATION CUT-OFF OR EMPLOYING AN AUCTION TO ASSIGN LICENSES.

The NAB, and many broadcast commenters, argue that, if the Commission intends to authorize DARS, it should not limit it to the existing applicants but reopen the filing window and "maximize the participation of as many parties as possible." NAB claims that there are no equities that favor existing applicants -- they proceeded at their own risk and can not claim protected status because no allocation or processing rules existed at cut-off upon which they could have claimed reliance.⁹⁴

NAB suggests that the Commission utilize auctions to assign licenses if additional entities file applications.⁹⁵ NAB argues that the Commission can utilize auctions even though existing applications were "pre-filed" -- timely-filed before Congress granted the Commission

⁹⁴ Only one commenter expressed interest in filing an application if the Commission finds it has legal authority to reopen the application cut-off.

⁹⁵ NAB appears to conclude that the existing applicants are not mutually exclusive. DSBC agrees. See Comments of DSBC at 35-36. Although applicants may employ differing system configuration parameters, they can be coordinated in accordance with the international Radio Regulations and without creating an inequitable burden on any applicant.

auction authority. NAB argues that the DARS case is different from cases in which the Commission sensibly exercised discretion and refused to auction pre-filed applications. In those cases, NAB maintains, the Commission relied on defined licensing procedures in services for which spectrum was allocated and found it administratively burdensome to change its licensing approach. In DARS these considerations allegedly do not apply. NAB points out that no processing rules or allocation existed when applications were filed in December, 1992, and alleges therefore that the administrative burden to reopen the proceeding is minimal. NAB, therefore, urges the Commission to depart radically from precedent, reopen the proceeding and license multiple applicants through an auction procedure, thus, ensuring more diversity of viewpoints and competition in the DARS industry.

A. No Legal or Policy Justification Has Been Offered That Supports Reopening The DARS Cut-Off Window.

The DARS proponents in their comments thoroughly briefed the legal, policy and equity arguments why the Commission can not hope to sustain a decision to reopen the cut-off or engage in auctions. Cut-off rules are intended to create administrative finality and afford protected status to timely-filed applicants so that they may prepare for the licensing process fully aware of the competitive playing field.⁹⁶ As the Commission astutely notes, reopening the process to new applicants only delays the proceeding, in turn delaying the initiation of new services to the public. As a result, the Commission strictly enforces cut-off rules and waives them only in compelling circumstances.⁹⁷ Strict adherence to the DARS cut-

⁹⁶ DSBC Comments, citing *City of Angels Broadcasting v. FCC*, 56 RR 2d 1459 (1984).

⁹⁷ *Meredith Heritage Strategic Partners, L.P.*, 76 RR 2d 1060 (1994); *Green Country Mobilephone, Inc.*, 55 RR 2d 1619 (1984) (strict enforcement of the cut-off rules is essential

off procedure is warranted because the procedure was properly implemented; each pending applicant has relied on the validity of the cut-off notice; and, acceptance of additional applications would undercut well-established Commission policy promoting efficient spectrum management.⁹⁸

In asserting that applicants proceeded at their own risk when they filed pursuant to the Commission's legally proper cut-off notice, NAB has confused the standard applied where a satellite applicant wishes to commence *construction* prior to licensing. The pending application is protected by well-established rights that arise upon cut-off, regardless of whether an allocation or service rules exist.⁹⁹ The absence of a domestic allocation for DARS was largely a procedural matter. An international allocation of spectrum exclusively for the U.S. DARS service had been secured months in advance of applications being filed.

Similarly, Cracker Barrel incorrectly alleges that the Commission has not accepted applications for new service until after it has allocated spectrum and established rules. Cracker Barrel may be correct in regard to terrestrial services, but it is clearly wrong in regard to new satellite services. In the DARS, Mobile Satellite, Big LEO and Little LEO proceedings, applications were accepted and cut-offs established by the Commission before the spectrum was allocated internationally, let alone domestically by the Commission. The Commission recently closed a cut-off window for a Band satellites at 28 GHz before

to administrative efficiency; applicants failed to establish compelling circumstances; public interest in competition is insufficient justification to reopen the cut-off).

⁹⁸ See DSBC Comments at 43-44.

⁹⁹ Big LEO applications were accepted and afforded protected status pursuant to a cut-off notice *before* there was an international allocation.

developing a spectrum sharing plan or creating rules for use of those frequencies.

Cracker Barrel requests that the Commission depart radically from its long-standing cut-off rules and satellite application processing procedures because of the novelty of the DARS service, the length of time since the cut-off date (34 months) and to promote competition. Novel technology and services subject to rapid advances were involved in both the Little LEO and Big LEO proceedings. Nevertheless, the Commission did not find it necessary to change its cut-off procedure, or reopen the proceeding to account for advances in technology, even though 44 months elapsed between the Big LEO cut-off date and initial licensing.¹⁰⁰ Moreover, the Commission has explicitly stated that it may not reopen a cut-off window absent compelling circumstances. Further, it has concluded that promoting competition, even where the cut-off window has been long closed, does not satisfy this requirement.¹⁰¹

This cut-of procedure is well-established and has been utilized often in the licensing of satellite services. Applicants are entitled to rely on the Commission's processing procedures identified in the cut-off notice and assert cut-off protection. The mischief that is done by the Commission ignoring its own application cut-off without compelling circumstances is considerable and irreparable.

¹⁰⁰ See, *In Re Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency bands, Report and Order*, 9 FCC Rcd. 5936, para. 66 (1994) [hereinafter *Big LEO Order*].

¹⁰¹ *The Telephone Company*, 31 RR 2d 1549 (1974); *Green Country Mobilephone*, 55 RR 2d 1619 (1984).

B. There Is No Legal Or Factual Justification Offered To Auction DARS Licenses.

As demonstrated in DSBC's Comments, the auction criteria enumerated in the Communications Act have not been met.¹⁰² The *sine qua non* for auctions, mutual exclusivity, has been eliminated by the applicants. Moreover, even assuming that the statutory auction criteria were fulfilled, the Commission has discretion to use licensing methods other than auctions to assign licenses to applicants on file before July 26, 1993, the effective date of auction authority.¹⁰³

Contrary to NAB's claim, the instant case presents facts more compelling than the cases in which the Commission has refused to auction applications filed before auction authority was conferred. Those applications were mutually exclusive and met the statutory requirements for auctions. Nevertheless, the Commission assigned licenses without resorting to auctions in recognition of their pre-filed status and the administrative burden of modifying the licensing approach midstream. Here, there is no mutual exclusivity and licenses may be assigned in an expedient, and administratively efficient, manner that serves the public interest in rapid initiation of a new service that will provide new services to the entire United States, including rural areas.

¹⁰² DSBC Comments at 38-42. Section 309(j) permits the Commission to use auctions to assign licenses only where each of the following criteria are met: (1) there are two or more mutually exclusive applications; (2) the principal use of the spectrum is for subscription services; and, (3) public interest objectives will be promoted. The Commission concedes that DARS applicants are not mutually exclusive and the applicants analysis and efforts confirm this conclusion.

¹⁰³ DSBC Comments at 40-41. "Amendment of Part 21 and 74 of the Commission's Rules", MM Docket 94-131, FCC 95-230 (released Jun. 30, 1995); "Cellular Unserved Areas", 9 FCC Rcd. 7387 (1994).

C. Reopening The Cut-Off Window And Auctioning DARS Licenses Will Guarantee Delay.

NAB, and other commenters, fail to present any countervailing considerations regarding the legality or equities of reopening the cut-off or auctioning licenses. Indeed, NAB's suggestion that the Commission reopen the application window and utilize auctions to assign licenses validates the concerns expressed by DARS applicants that such actions will only create delay. NAB argues that even minimal competition from DARS will have substantial negative effects on broadcasters, thus, no DARS licenses should be issued. It then argues that if the Commission concludes that DARS may go forward, the Commission should reopen the proceeding and auction license to as many multichannel service providers as possible in the interest of robust competition. One would ordinarily be disconcerted by the contradiction inherent in this statement. However, it comports with the NAB's goals of delay, obfuscation and stonewalling regarding DARS. If the Commission was doubtful of claims that reopening the proceeding and auctioning was a method to create delay and increase costs, the NAB's proposed licensing procedure should confirm it. *Delay and increased costs to competitors are the only possible reasons that the NAB would propose that more DARS licenses be issued.*

In addition, delay caused by the Commission's proposal to reopen the filing window and auction DARS licenses will add years to the licensing process as the case moves through the appeals process.¹⁰⁴ This is plainly the result that NAB seeks because it will continue to hobble DARS by ensuring that licensing of this service is as difficult, lengthy and costly as

¹⁰⁴ "Hundt: FCC Auction is Stymied by Court," Radio Communication Report, September 4, 1995.

possible. The licensing procedure suggested by NAB and others that propose that the Commission reopen the application window, violates Section 7 of the Act, which instructs the Commission to rapidly initiate new services and the auction statute, which seeks to promote efficient licensing of new services, particularly those that propose to increase service to rural areas.

The Commission must not heed NAB's disingenuous assertion that the public interest will be served only if the Commission "allows as many qualified parties as possible[to] bring their competitive strengths to bear in the satellite radio marketplace."¹⁰⁵

IV. THE RECORD SUPPORTS ONLY MINIMAL TECHNICAL AND SERVICE RULES.

DARS is a new high-technology service that holds great promise. However, because it is a new service and because it entails the development and launch of satellites, it is a high risk and capital intensive venture. The Commission should proceed cautiously when considering whether and how to regulate DARS. It must be careful not to impose regulations that may discourage investment or act as disincentives to initiation of DARS. In addition, onerous technical and service rules in a new, high-tech venture, will increase the risk perceived by an investor or financial institutions.

As DSBC has stated many times, the most prudent path for the Commission is to impose minimal regulations on this new service. The Commission has recognized that new services, especially satellite services, are risky propositions that require regulatory flexibility to thrive. Therefore, service rules should not limit relationships or business decisions that

¹⁰⁵ NAB Comments at 59.

may help these new and unproven services develop. If, at a later date, the Commission decides that the DARS industry requires further regulation, it will be in a position to develop rules specifically tailored to the industry as it has developed. Flexibility will encourage and facilitate introduction of DARS and permit the operators to offer services that the public needs and wants. In contrast, constraints on DARS may reduce its desirability to the public and increase operators costs and risks, in turn reducing the ability of DARS licensees to secure financing and decreasing the probability that a viable service will be initiated. As a result, DSBC urges the Commission to adopt only minimal restraints on financial structure, ownership and operations.¹⁰⁶

A. Minimal Service Regulations Will Benefit The Public Interest In Rapid Initiation Of A Flexible DARS Service.

NAB, and others,¹⁰⁷ propose onerous and unnecessary program obligations. These parties urge the Commission to structure the introduction of DARS to protect local stations in smaller markets and ensure that DARS offers public-oriented services. In this regard, NAB urges the Commission to authorize DARS as a subscription-only service and require that it adhere to the obligations imposed on broadcasters regarding, *e.g.*, political broadcasting requirements and issue oriented programming..

Service Classification. It is virtually impossible to identify a single service

¹⁰⁶ The Commission recognized the benefits of minimal regulation of developing services such as DARS in its treatment of the Direct Broadcast Satellite ("DBS") industry. There, the Commission adopted a regulatory scheme that allowed the business judgements of the individual applicants to shape the financial structure and the type of services offered. *Direct Broadcast Satellite Order*, 90 FCC 2d 676 (1982). DSBC urges similar regulatory treatment for DARS.

¹⁰⁷ See, for example, Comments of Media Access Project.

classification for DARS operators -- it is probable that DARS operations will include aspects of several classifications. DARS providers are likely to retain some capacity in order to create and deliver their own program services. In addition, they have proposed to offer capacity to programmers on a common carrier basis. In the latter case, the DARS licensee will exercise no editorial or programming control and programming obligations or restrictions would be difficult, if not impossible, to enforce.

Subscriptions/Advertisements. As DSBC discussed in its Comments, the Commission should permit DARS operators the flexibility to structure their service offerings to respond to market demands and meet business needs. Thus, licensees should be permitted to choose the appropriate mix of subscriptions and advertiser-supported services and program material to create a viable and attractive service. Many commenters encourage the Commission to adopt a flexible approach to service rules in order to ensure that DARS operators have the ability to provide services of benefit to the public.¹⁰⁸

Advertising may enable the service generally and, contrary to NAB's assertion, may support the viability of particular niche services. Some proponents intend to offer a free advertising-supported service to stimulate receiver penetration, *perhaps the most critical component of the success of this new service*. Some niche programming may be more easily supported by advertising while other niche programming is more appropriately supported by subscriber fees. For example, NAB's Consumer Interest Study demonstrates that senior citizens would be more interested in DARS programming if they did not have to pay a

¹⁰⁸ C-SPAN points to deregulation of cable as its impetus; Citizens for a Sound Economy believes it will permit rural service to grow; United Church of Christ believe niche services will flourish without regulations.

subscription fee. This is understandable since many may be on fixed incomes. Thus, programming directed to seniors, which is otherwise unavailable, might find a market if it is supported by ads, but may not find a market if it is supported by fees. Similarly, potential listeners with limited disposable income might be attracted to advertising-supported niche programming. Families with children, on the other hand, might be willing to pay a fee for children's programming that does not constantly bombard them with advertisements. Contrary to broadcaster's assertion, subscription-based DARS is not necessary to create the economic environment to deliver niche programming, flexibility is.

Inter-and Intra-Service Sharing. DSBC supports the Commission's proposal to permit DARS licensees to create relationships that will permit the success of this new service, including inter-service sharing, cross-polarization in other licensee's frequencies by mutual agreement, and acquisition of spectrum from other licensees.¹⁰⁹ Allowing one licensee to use the frequencies of another DARS operator, pursuant to mutual agreement falls into the class of relationships that could prove beneficial to initiation of DARS. The Commission must not adopt rules that will limit post-permit/license settlements and ventures between applicants that have proven efficient or procompetitive in the context of other services.¹¹⁰ Given the cost and risk involved in initiating a new, innovative, but unproven satellite service, restricting the types of relationships that service providers may enter into could prove fatal. For this reason,

¹⁰⁹ *DARS NPRM* at ¶ 80.

¹¹⁰ For example, the DARS rules should not prohibit a relationship comparable to that entered into by United States Satellite Broadcasting Co., Inc. and Hughes Communications Galaxy, Inc. The agreement of two DBS licensees to share a common technical infrastructure while maintaining separate billing and customer service organizations permitted the efficient initiation of competitive and affordable DBS services.

DSBC objects to the proposed rule 25.214(b)(6) as contrary to the flexibility that must be afforded DARS licensees.

Cracker Barrel requests that the Commission require that two licensees share each of seven spacecraft. The administrative and regulatory burdens created by such a scheme would do nothing more than arrest, rather than advance, DARS.

Moreover, its multiple entry proposal defies the realities of the marketplace. First, there is little possibility that 15 licensees can be economically viable. Second, Cracker Barrel proposes that licensee's share satellites pursuant to regulatory fiat. While shared facilities were successfully employed in DBS, it was pursuant to private negotiation. Similar relationships should be permitted, but not forced, in DARS.

Financial Qualifications. All applicants agree that the Commission should adopt the financial qualifications standard proposed -- a business plan demonstrating construction launch and operation for one year, plus milestones. DSBC reiterates its support for the Commission's financial criteria, to which there were no objections. However, when reviewing the financial qualifications of the applicants, the Commission must bear in mind the difficulty, generally, of raising money for satellite services. This difficulty has been exacerbated by additional uncertainty in the instant proceeding including a delay of two and one half years, an allocation of 50 MHz to DARS followed by a licensing proposal for 40 MHz, and the possibility of auctions among applications filed well before auction authority was conferred on the Commission in a service that meets none of the auction criteria. Needless, to say this lack of certainty causes hesitation among potential investors. Until these